



# STATE OF IDAHO

C.L. "BUTCH" OTTER  
Governor  
Celia R. Gould  
Director

## DEPARTMENT OF AGRICULTURE DIVISION OF ANIMAL INDUSTRIES

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### STATE OF IDAHO, DEPARTMENT OF AGRICULTURE

#### DIVISION OF ANIMAL INDUSTRIES

IN THE MATTER ANDREW &	)	NOTICE OF VIOLATION AND
JEROME FITZGERALD DBA 4 BROS.	)	PROPOSED ORDER ASSESSING
DAIRY, INC.	)	CIVIL PENALTIES
Respondents.	)	
	)	

This Notice of Violation and Proposed Order Assessing Civil Penalties ("Notice of Violation") is issued by the Idaho State Department of Agriculture ("ISDA") pursuant to Title 37, Chapter 6, Idaho Code. The ISDA has identified certain alleged violations, more fully described below of Title 37, Chapter 6, Idaho Code and IDAPA 02.04.14.000 *et seq.*, the Rules Governing Dairy Waste.

#### I. JURISDICTION

- 1.1 Under the legal authority of Title 37, Chapter 6, Idaho Code, ISDA administers the Rules Governing Dairy Waste, IDAPA 02.04.14.000 *et seq.*
- 1.2 Andrew & Jerome Fitzgerald own and operate 4 Bros Dairy, a permitted Grade A dairy facility (Respondent), located at 425 N 250 W Shoshone, ID 83352.
- 1.3 According to the Respondent's last annual report filed with the Idaho Secretary of State's office, dated December 27, 2016, Andrew Fitzgerald, 425 N 250 W Shoshone, ID 83352-5141, is the current registered agent for Respondent.
- 1.4 All actions referred to in this Notice of Violation occurred in Lincoln County in the State of Idaho.

#### II. REGULATORY FRAMEWORK

- 2.1 Idaho Code §37-604(21) defines "Unauthorized Release" as:

A release of dairy byproducts to ground water or surface waters of the state that are not waters of the United States or beyond land owned or operated by the dairy farm that results from a dairy farm's failure to comply with its environmental management plan. Unauthorized release shall not include an upset condition, an agricultural stormwater discharge or infiltration from storage and containment facilities that is within engineering standards and specifications published by the United States department of agriculture

natural resources conservation service or by the ASABE, or other equally protective criteria approved by the director.

2.2 IDAPA 02.04.14.030 provides, in pertinent part:

The Department is authorized to approve the design, construction, operation, and location of dairy waste systems. These systems must conform to the NMP, NMS, and Appendix 10D.

.01.a. Waste containment structures shall be constructed to meet a minimum of one hundred eighty (180) days of holding capacity. Wastewater containment structures that are utilized as the secondary or final storage for effluent shall have a minimum two (2) vertical feet of freeboard.

.01.b. Earthen waste containment structures less than ten (10) vertical feet high with a maximum high water line of eight (8) vertical feet shall be required to have a top embankment width of at least eight (8) feet and a minimum of one (1) vertical foot of freeboard shall be maintained. The combined inside and outside embankment slopes must be at least five (5) horizontal to one (1) vertical, and neither slope shall be steeper than two (2) horizontal to one (1) vertical. Earthen waste containment structures with outside embankments higher than ten (10) vertical feet from the naturally occurring ground level shall meet the NRCS Idaho Conservation Practice Standard Waste Storage Facility Code 313 December 2004 embankment requirements as incorporated by reference in Subsection 004.03 of these rules.

01.c. The inside bottom of the waste containment structure shall be a minimum of two (2) feet above the high water table, bed rock, gravel, or permeable soils. For an earthen waste containment structure, a soil liner shall be installed such that the specific discharge rate of the containment structure meet  $1 \times 10^{-6} \text{ cm}^3/\text{cm}^2/\text{sec}$  or less as described in Appendix 10D. Concrete or synthetic liners must be constructed to the American Society of Agricultural and Biological Engineers Specification ASAE EP393.3 Manure Storages February 2004 and Appendix 1D as incorporated by reference in Section 004 of these rules.

.01.d Storage areas for dairy waste including compost and solid manure storage areas shall be located on approved soils and appropriately protected to prevent run on and run off.

2.3 Idaho Code § 37-608 states, in pertinent part:

(1) No dairy farm shall cause an unauthorized discharge or an unauthorized release.

...

(3) The department shall determine the appropriate corrective, compliance or other enforcement action to be taken with respect to unauthorized releases.

2.4 Idaho Code §37-609(3) states, in pertinent part:

For noncompliance conditions or unauthorized releases, the director or his designee shall have the authority to assess a fine of up to ten thousand dollars (\$10,000) per occurrence. Civil penalties collected under this subsection shall be remitted to the county where the violation occurred for deposit in the county current expense fund.

### **III. FINDINGS OF FACT**

- 3.1 On February 21, 2017, ISDA Dairy Bureau Chief Marv Patten received a voicemail from Respondent who stated their dairy facility was discharging dairy byproduct into the Milner Gooding Canal. Mr. Patten also received, via email, two (2) photographs taken by Dale Hellwinkel on February 20, 2017, that documented the discharge of dairy byproduct into the Milner Gooding Canal from lagoons owned by Respondent's Dairy. The two (2) discharges were the result of Respondent's using a PTO pump (Lagoon 4-3) and the excavation of the lagoon and canal bank (Heifer Lagoon) to allow dairy byproduct to flow into the canal.
- 3.2 On February 21, 2017, Mr. Patten contacted ISDA Inspector Niki Holder to inform her that the Respondent's facility was discharging dairy byproduct and directed her to investigate the incident. At 1:30pm, Inspector Holder arrived on the facility and confirmed that dairy byproduct and process water was flowing off the facility's property in two (2) locations. She also confirmed the Heifer Lagoon on the west side of the facility had been intentionally excavated to allow effluent from the lagoon to flow into Milner Gooding canal, as depicted in the photo submitted by Mr. Hellwinkel. Inspector Holder observed Lagoon 2-2, on the east side of the facility, had been overwhelmed and allowed to over flow into the Milner Gooding Canal. Inspector Holder collected water samples from multiple sites on the facility for testing and informed Respondent that the two (2) discharge sites (Heifer Lagoon and Lagoon 2-2) needed to be repaired as soon as possible and the discharging stopped immediately.
- 3.3 On February 22, 2017, Inspector Holder, ISDA Inspector Candace Lucero and ISDA Inspector Jaden Pollard, travelled to the Dairy and spoke with Andrew and Jerome Fitzgerald regarding the progress of the repairs to the lagoons and the status of the discharges. Andrew and Jerome Fitzgerald stated the repairs had not yet been completed. Inspector Holder emphasized again to Respondent it was imperative that the two (2) discharge sites (Heifer Lagoon and Lagoon 2-2) be repaired as soon as possible and the discharging stopped immediately.
- 3.4 On February 23, 2017, Inspector Holder and Inspector Lucero again travelled to Respondent's Dairy to determine the status of the repairs and discharges. Respondents stated the Heifer Lagoon had been repaired, but Lagoon 2-2 had not yet been repaired. Inspector Holder and Inspector Lucero conducted a follow-up inspection and verified the canal and lagoon banks of the Heifer Lagoon, on the west side of the facility, were in the process of being repaired and the discharge of dairy byproduct and process water from the Heifer Lagoon had been stopped. The inspectors also verified Lagoon 2-2 on the east side of the facility had not been repaired and was still actively discharging. The inspectors told Respondents this discharge site must be repaired as soon as possible.

- 3.5 On February 24, 2017, Respondent contacted Inspector Lucero, via phone, and informed her that the repairs to Lagoon 2-2, on the east side of the facility, were nearly complete. Inspector Lucero travelled to the dairy later that day and conducted a follow-up inspection which verified the repairs to the lagoon were complete and the discharge of dairy byproduct and process water into the canal had been stopped.
- 3.6 On February 24, 2017 and March 6, 2017, the ISDA received the laboratory results, from the water samples collected on Respondent's dairy on February 21, 2017. The test results confirmed the presence of dairy byproduct at both discharge sites on the facility.

#### **IV. CONCLUSIONS OF LAW**

- 4.1 On February 20, 2017, Respondent violated Idaho Code §37-608 by committing two (2) unauthorized releases of dairy byproduct beyond land owned or operated by the dairy farm (Heifer Lagoon and Lagoon 4-3).

Proposed Civil Penalty:       \$20,000                   (\$10,000 per violation)

- 4.2 On February 21, 2017, Respondent violated Idaho Code §37-608 by committing two (2) unauthorized releases of dairy byproduct beyond land owned or operated by the dairy farm (Heifer Lagoon and Lagoon 2-2).

Proposed Civil Penalty:       \$20,000                   (\$10,000 per violation)

- 4.3 On February 22, 2017, Respondent violated Idaho Code §37-608 by committing two (2) unauthorized releases of dairy byproduct beyond land owned or operated by the dairy farm (Heifer Lagoon and Lagoon 2-2).

Proposed Civil Penalty:       \$20,000                   (\$10,000 per violation)

- 4.4 On February 23, 2017, Respondent violated Idaho Code §37-608 by committing an unauthorized release of dairy byproduct beyond land owned or operated by the dairy farm (Lagoon 2-2).

Proposed Civil Penalty:       \$10,000

**Total Proposed Civil Penalty: \$70,000**

## OPPORTUNITY TO RESPOND


You have the right to a formal administrative hearing in accordance with the Idaho Administrative Procedure Act, Title 67, Chapter 52, Idaho Code. Alternatively, the ISDA Rules of Practice and Procedure encourage the use of informal proceedings also known as a settlement meeting to settle or determine contested cases.

If you wish to resolve this matter without proceeding to an administrative hearing, a settlement meeting can be scheduled at the ISDA office located at 2270 Old Penitentiary Road, Boise, Idaho 83712. A request for an informal settlement meeting must be made to the ISDA via phone or email within fourteen (14) days of receipt of this Notice of Violation. Please contact Dr. Scott Leibsle, Deputy Administrator, Division of Animal Industries, to schedule an informal settlement meeting at (208) 332-8540 or [scott.leibsle@isda.idaho.gov](mailto:scott.leibsle@isda.idaho.gov). The following representatives from the ISDA Division of Animal Industries may be in attendance at the settlement meeting: Administrator, Bureau Chief, Investigator, and Deputy Attorney General. You may wish to be represented by legal counsel at the settlement meeting; however, you are not required to have an attorney present. At the settlement meeting, the ISDA will review the facts of your case, including any information you may wish to provide. After reviewing the facts, the ISDA will discuss with you an appropriate course of action.

If you wish to forego the informal settlement process and request a formal administrative hearing, it must be submitted in writing either via email, fax or standard letter. Please address requests for administrative hearing to Dr. Scott Leibsle, Deputy Administrator, P.O. Box 790, Boise, Idaho, 83701; Email: [scott.leibsle@isda.idaho.gov](mailto:scott.leibsle@isda.idaho.gov); or fax your request to the Dairy Bureau, Division of Animal Industries at (208) 334-4062.

DATED this 28<sup>th</sup> day of March, 2017

IDAHO STATE DEPARTMENT OF AGRICULTURE

  
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Scott R. Leibsle DVM, DABVP  
Deputy Administrator  
Division of Animal Industries